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IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.,

JOSEPH F. TUNSTALL,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.,

JOHN E. SMALLWOOD,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

QUESTION PRESENTED FOR REVIEW.

Did the United States Court of Appeals for the Third Circuit properly deny an application for a writ of mandamus or prohibition to review the discretion exercised by a district judge who, after full consideration of extensive affidavits concerning all of the interests specified in Title 28 U. S. C. § 1404(a), had granted three motions for transfer?

STATEMENT OF THE CASE.

The petitioners each brought a suit under the Federal Employers' Liability Act in the United States District Court for the Eastern District of Pennsylvania to recover for injuries sustained in a derailment near Dillon, South Carolina. The defendant, Atlantic Coast Line Railroad Company, filed motions to transfer the actions, pursuant to Title 28 U. S. C. § 1404(a), to the United States District Court for the Eastern District of South Carolina (Florence Division), the district and division in which the accident occurred. Affidavits were filed in support of and in opposition to the transfer motions. The affidavits are set forth in the Appendix to this brief.

In his opinion granting the transfer motions (printed at pp. 32-34 of Petitioners' Brief), Chief Judge Kirkpatrick discussed the salient features of the affidavits. He was satisfied that at trial the Railroad Company would need to produce nearly twenty-four fact witnesses, at considerable expense (the defense witnesses reside chiefly in North and South Carolina, and the estimated cost of their attendance at a trial in Philadelphia is close to $5,000—Appendix, pp. 4a-5a, 9a-11a, 15a-17a, 18a-20a). On the other hand, he felt that petitioners would call, at most, only two or three of their possible passenger witnesses, with reference to the issue of liability. As to medical testimony, he believed that the railroad would need to call only some of the doctors and hospital employees who had treated petitioners during their periods of hospitalization in South Carolina (Appendix, pp. 20a-21a), whereas petitioners would need the testimony of Philadelphia and Washington physicians who had examined or attended them after their discharges from South Caroline hospitals (Appendix, pp. 24a, 28a, 30a).

Judge Kirkpatrick considered the fact that only Petitioner Norwood is a resident of the district where the suits were brought and "has a stronger case than the others with regard to the medical witnesses"—having been treated by

two physicians in Philadelphia and two in Chester, Pennsylvania (the railroad's affidavit listed eight South Carolina doctors who had attended Norwood while he was hospitalized there—Appendix, pp. 20a-21a). These factors were considered insufficient to outweight "the heavy balance of convenience in favor of the defendant in connection with the liability witnesses", particularly in view of the fact that Norwood had initially selected Chicago as an appropriate forum by instituting suit there before he commenced his suit in Pennsylvania (Petitioner Tunstall had also started suit in Chicago, and each of the petitioners had been represented by New York counsel, by Chicago counsel, and finally by Philadelphia counsel (Appendix, pp. 22a-23a).

The district judge pointed out that there were other considerations, such as the congested condition of the court calendar in the Eastern District of Pennsylvania, and stated, specifically, "I have not overlooked the weight to be given to plaintiffs' choice of a forum."

Following the filing of Judge Kirkpatrick's opinion, petitioners applied for a writ of mandamus or prohibition to restrain Judge Kirkpatrick from entering an order transferring the cases. The Court of Appeals for the Third Circuit denied the writ without opinion. Petitioners' subsequent application for a rehearing was also denied without opinion.

ARGUMENT.

The true issue raised by the petition is whether certiorari should be granted in order that this Court may review a district court judge's interlocutory exercise of the discretion vested in him by Title 28 U. S. C. § 1404(a), after a Court of Appeals has declined, through mandamus, to substitute its discretion for that of the district judge. Such a review would necessarily require this Court to weigh and evaluate all of the factors enumerated in the affidavits submitted to and considered by the district judge (see the Appendix to this brief).

Petitioners would have this Court review not the Third Circuit's decision in the instant cases, but what they assert to be its holding in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3rd Cir. 1952). They apparently believe that in this manner they can create a conflict between circuits on which to predicate the petition for certiorari. They assert that the Third Circuit is out-of-step with other circuits, arguing that it refuses to recognize plaintiff's choice of forum as a factor to be considered in granting or denying a transfer motion. But the decision from which petitioners seek relief is the refusal of the Third Circuit to reverse the exercise of discretion by the district judge, who gave appropriate consideration to the various interests stipulated in § 1404(a), including, specifically, the important factor of petitioners' choice of forum.

For this Court to grant certiorari there should be a square and irreconcilable conflict between the *decision* of the Third Circuit in the instant cases and the *decisions* of other courts of appeals or the *decisions* of this Court. Supreme Court Rule 19. No conflict in fact exists, and the petition should therefore be denied. See *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387, 392-393 (1923); *Wisconsin Electric Co. v. Dumore Co.*, 282 U. S. 813 (1931).

I. The Third Circuit's Interpretation of § 1404(a) Does Not Conflict With the Decisions of This Court or the Decisions of Other Circuits.

Petitioners devote their argument to an attack on the decision of the Court of Appeals for the Third Circuit in *All States Freight, Inc. v. Modarelli,* 196 F. 2d 1010 (3rd Cir. 1952), claiming (Petitioners' Brief, p. 16) that it ". . . is a mandate to district court judges to refuse to recognize plaintiff's choice of forum as a factor" to be considered in granting or denying transfer motions. Petitioners err not only in their assertion of the issue now before this Court—the propriety of reviewing the Court of Appeal's action in the instant cases *in which proper weight was given to petitioners' choice of forum by the district judge*—but also in the conclusion they seek to draw from the decision in *All States Freight, Inc. v. Modarelli, supra.* There, the district judge *denied* a motion for transfer and review of the denial was sought by mandamus. The Court of Appeals refused to issue mandamus because the district judge had "considered the interests stipulated in the statute and decided thereon" (196 F. 2d at 1012). The decision can in no way be interpreted as a mandate to district court judges to refuse to recognize the important interest of plaintiff's choice of forum. On the contrary, the Third Circuit's refusal to reverse Judge Modarelli, who had declined to disturb plaintiff's choice of forum, sustains that interest.

Petitioners refer to *Paragon-Revolute Corp. v. C. F. Pease Co.,* 120 F. Supp. 488 (D. C. Del. 1954), and *General Felt Products Co. v. Allen Industries, Inc.,* 120 F. Supp. 491 (D. C. Del. 1954), as examples of recent interpretations of *All States Freight, Inc. v. Modarelli, supra,* by district courts in the Third Circuit. So they are. In both, plaintiff's choice of forum was given weight. It is significant that petitioners fail to mention *Busch v. Reiss S. S. Co.,* 120 F. Supp. 886 (D. C. Del. 1954), cited in *General Felt Products Co. v. Allen Industries, supra,* in which the same district court, in refusing transfer, said, at p. 887:

> "I do not understand the Modarelli case to say, however, that the plaintiff's choice of forum is not a factor to be considered in the application for transfer under 1404(a) or that the conveniences of the defendant and his witnesses must not somewhat outweigh the conveniences of the plaintiff and his witnesses, together with his generally accorded privilege of choice of forum."

Similarly, Chief Judge Kirkpatrick in the instant cases considered and gave weight to petitioners' choice of forum. The fact that he did so on the authority of *All States Freight, Inc. v. Modarelli, supra,* only serves to point up the speciousness of petitioners' argument.

The Third Circuit has recognized, as have all courts, that the doctrine of *forum non conveniens* is different from § 1404(a); the former involves a dismissal of the action, the latter does not.[1] As a result of this obvious difference the Third Circuit has said that the preconceived limitations of *forum non conveniens* are not to be applied in § 1404(a) cases. It has not said that the *interests* to be considered when applying the statute differ from the interests enumerated in the celebrated *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508-509 (1947). Some courts describe the application of § 1404(a) in terms of *forum non conveniens,* others in terms of "balance of convenience". However, the same interests are considered and, on substantially the same facts, identical results are obtained irrespective of the language employed to describe the nature of the interests considered. On the basis of the facts presented to Judge Kirkpatrick in this case, we submit, all would agree that the transfers were proper.

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1. See *All States Freight, Inc. v. Modarelli, supra,* p. 1011.

A. *The Supreme Court Has Not Held That the Doctrinal Limitations of Forum Non Conveniens Must Be Applied in § 1404(a) Transfer Cases.*

The decisions of this Court cited by petitioners do not hold that doctrinaire limitations of *forum non conveniens* must be applied in § 1404(a) transfer cases. Thus in *Ex Parte Collett*, 337 U. S. 55 (1949), the issue before this Court was the applicability of § 1404(a) to Federal Employers' Liability Act cases. The court held that under § 1404(a) relief may be had in Liability Act cases on the ground of inconvenient forum.[2]

The phrase *forum non conveniens* is a short-hand method by which to describe generally the considerations involved under § 1404(a) and the concept of an inconvenient forum. See, e.g., *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 186 (1952). Although this Court has not held that the preconceived limitations of the legal doctrine of *forum non conveniens* should be applied in § 1404(a) cases, the various interests or considerations enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947), do serve to guide district judges in passing on transfer motions. Chief Judge Kirkpatrick considered and discussed those interests in the instant case.

For purposes of this application for certiorari petitioners seek to ignore the weight the district judge gave to their choice of forum. They also seem to contend that there is something unusual and different about the initial selection of forum in a Liability Act case. However, nothing in the decision of this Court in *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263 (1949), relied upon by petitioners, supports such a contention. *Ex Parte Collett, supra*, p. 60,

2. In *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953), the issue before the Court was the applicability of § 1404(a) to state court actions, and the holding was that it had conferred no power upon state courts. In *Wells v. Simonds Abrasive Co.*, 345 U. S. 514 (1953), the issue was one under the Full Faith and Credit Clause of the Federal Constitution, and § 1404(a) was in no way involved.

pointed out that § 6 of the Liability Act defines the proper forum; § 1404(a) deals with the right to transfer an action properly brought. "The two sections deal with two separate and distinct problems." The distinction was recognized in *Boyd v. Grand Trunk Western R. Co., supra*, p. 266, when this Court explained that nothing in *Ex Parte Collett, supra*, ". . . affects the *initial choice* of venue afforded Liability Act plaintiffs." (Emphasis supplied.) Once the first choice is made by plaintiff, § 1404(a) operates as freely and fully in Liability Act cases as in any other type of action.[3]

B. *There Is No Real Conflict Among Circuits Concerning the Interpretation of § 1404(a).*

Although there is no holding of this Court which supports petitioners' contention that § 1404(a) is subject to the limitations of the doctrine of *forum non conveniens*, three circuit court decisions superficially, at least, seem to support their contention. *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2nd Cir. 1950), *cert. denied*, 340 U. S. 851 (1950);

3. The affidavits of both sides in the district court clearly indicate that these cases present the element of "shopping around", not for a convenient forum but for one to petitioners' liking (Appendix, pp. 22a-23a, 32a-35a). Petitioners had retained different attorneys in New York, Chicago and Philadelphia. Two of them even instituted suits in Chicago. Judge Kirkpatrick recognized that petitioners had "shopped around" and, therefore, found it impossible to accept at face value their contention that Philadelphia was the most appropriate and convenient forum. Cf. *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S. D. N. Y. 1950). It was this very evil, so prevalent in Liability Act cases prior to § 1404(a), that the statute was designated to correct. The notes of the revisor of the Judicial Code accompanying § 1404(a) say:

> ". . . As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Nicol v. Koscinski, 188 F. 2d 537 (6th Cir. 1951); *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954). Basically these three decisions hold that the various interests considered in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947) are substantially the same interests to be considered in an application of § 1404(a).

However, the cases, of which *All States Freight, Inc. v. Modarelli, supra*, is one of several,[4] which say that the doctrine of *forum non conveniens* differs from § 1404(a) in no way preclude consideration of the interests enumerated in *Gulf Oil Corp. v. Gilbert, supra*, in determining the propriety of transfers under § 1404(a). On the contrary, substantially the same interests are considered. For example, in *Headrick v. Atchison, Topeka & Santa Fe R. Co.*, 182 F. 2d 305 (10th Cir. 1950) the court, although recognizing that § 1404(a) differs from the doctrine of *forum non conveniens* and perhaps, therefore, confers greater discretion on the district court, cited *Gulf Oil Corp. v. Gilbert, supra*, as a guide to determine the interests stipulated in the statute. Therefore, in many cases (including many enumerated on pp. 20-21 of Petitioners' Brief) reference is made to the *Gulf Oil Corp. v. Gilbert, supra*, and to *forum non conveniens*. Again, it should be emphasized that Judge Kirkpatrick, in the instant cases, weighed the very interests enumerated in the *Gulf Oil* case.

Judge Ryan in *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y. 1950), in which he denied a motion for transfer (affirmed in *Ford Motor Co. v. Ryan, supra*, relied upon so heavily by petitioners), said at p. 50:

> "This Court has held that Section 1404(a) is but a codification of the doctrine of *forum non conveniens* . . . Other courts have said that it differs from *forum non conveniens* . . .

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4. See also *Amalgamated Ass'n. v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (5th Cir. 1949); and *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950).

> "*But, differences in characterization do not necessarily lead to differences in result* . . . It is also clear that since the remedy available under Section 1404(a) —i. e., transfer—differs from and is less harsh than the remedy available under *forum non conveniens*— i. e., dismissal—the court in the course of balancing the various factors which must be examined to determine the availability of a remedy, *as set forth in the Gulf Oil case, supra,* will give different emphases to those factors . . . *To this degree a new standard can be said to have been established, although the standard would defy precise definition.*" (Emphasis supplied.) [5]

Judge Irving Kaufman of the Southern District of New York, after the Court of Appeals decision in *Ford Motor Co. v. Ryan, supra,* in his *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F. R. D. 595 (1951), considered the relationship between § 1404(a) and the doctrine of *forum non conveniens.* At 10 F. R. D. 598, he said:

> "Hence some district courts have stated that 1404(a) is merely a codification of the doctrine of forum non conveniens. On the other hand other district courts have said that the section has introduced a new principle into federal procedure. *Despite these varying characterizations, there is really little disagreement among the courts as to the applicability and scope of the section. All are more or less in agreement that the remedy under 1404(a)—i. e., transfer—is less harsh than the dismissal under forum non conveniens, and hence are more prone to grant a transfer upon a showing of inconvenience.*" (Footnotes omitted and emphasis supplied.)

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5. Compare the reference to imprecise standards in Justice Jackson's dissenting opinion in *Wells v. Simonds Abrasive Co.,* 345 U. S. 514, 522 (1953), at p. 22 of Petitioners' Brief.

He then pointed out, at 10 F. R. D. 605:

> "The criteria used to determine a motion to transfer are, in most cases, those enumerated by the Supreme Court in Gulf Oil Corp. v. Gilbert, a forum non conveniens case . . ."

Careful examination of the cases listed by petitioners on pages 20 and 21 of their Brief discloses that under the facts in each case the result would have been the same in all circuits. For example, in *Nicol v. J. C. Penny Co.*, 97 F. Supp. 83 (E. D. Mich. 1951), affirmed in *Nicol v. Koscinski, supra* (which petitioners claim is in conflict with the Third Circuit's interpretation of the statute), a transfer was granted, on the basis of the interests set forth in *Gulf Oil Corp. v. Gilbert, supra,* although plaintiff was a resident of the forum and the factors favoring transfer were much less compelling than those involved in the three instant cases.[6]

The three circuit court decisions (*Ford Motor Co. v. Ryan, supra; Nicol v. Koscinski, supra;* and *Wiren v. Laws, supra*), upon which petitioners rely to support their contention that the Third Circuit's interpretation of § 1404(a) is improper, recognize that plaintiff's choice of forum is an important interest and that a bare balance of convenience in favor of defendant and his witnesses is insufficient to warrant disturbing plaintiff's choice of forum. However, petitioners studiously ignore the fact that the same recognition is accorded plaintiff's choice of forum in the Third Circuit. In the instant cases Chief Judge Kirkpatrick did ". . . not overlook the weight to be given to plaintiffs' choice of a forum." However, "the heavy bal-

6. In *Nicol v. J. C. Penny Co., supra,* defendant had ten employee witnesses who resided in or near the transferee forum (while in the instant cases defendant has some twenty-four liability and several medical witnesses), and the plaintiff and her seven witnesses resided in the forum where suit was instituted (while in the instant cases petitioners, only one of whom resides near Philadelphia, have, except for medical testimony, only two or three unimportant fact witnesses in or near Philadelphia).

ance of convenience in favor of the defendant in connection with the liability witnesses" dictated transfer. The Court of Appeals for the Third Circuit simply refused to reverse Judge Kirkpatrick's exercise of discretion.

In summary, petitioners claim that decisions of the Third Circuit interpreting § 1404(a) conflict with decisions of this Court and of other Courts of Appeal. As is so well illustrated by the refusal to disturb the district judge's discretion in the instant cases, the conflict is illusory, not real.

II. The Decisions of the Third Circuit With Respect to Whether Mandamus Will Issue to Correct a Transfer Order of the District Court Do Not Conflict With the Decisions of This Court or the Decisions of Other Circuits.

In the portion of their brief dealing with mandamus (pp. 23-27) petitioners again confine their argument to an attack on *All States Freight, Inc. v. Modarelli,* 196 F. 2d 1010 (3rd Cir. 1952), rather than the Third Circuit's refusal to reverse by mandamus Chief Judge Kirkpatrick's exercise of discretion in the instant cases. Petitioners would have this Court believe that on the authority of *All States Freight, Inc. v. Modarelli, supra,* the Third Circuit will never invoke mandamus to correct a transfer order of the district court, no matter, as they say, "how egregious its error may be" (Petitioners' Brief, p. 23). Again, they err not only in failing to meet the issue now before this Court—whether or not the denial of mandamus by the Third Circuit in the instant cases should be reviewed by certiorari—but also in the conclusion they draw from the decision in *All States Freight, Inc. v. Modarelli, supra.* There, the Third Circuit merely said that it will not grant review by mandamus, "where the district court has considered the interests stipulated in the statute and decided thereon" (p. 1012). This can only mean that if the district judge has based his order granting or denying transfer on

interests other than those enumerated in § 1404(a), or has failed to consider the interests enumerated, his action will be reviewed by mandamus.

To claim that the Third Circuit will never issue mandamus is to ignore the leading case of *Paramount Pictures, Inc. v. Rodney*, 186 F. 2d 111 (3rd Cir. 1951), *cert. denied*, 340 U. S. 953 (1951). There the Court of Appeals granted mandamus because the district judge misconstrued the statute on the question of other available fora. Although defendant was not amenable to service in the proposed transferee forum, it had, by seeking transfer, consented to suit there and so suit "might have been brought" there under § 1404(a). The district judge had based his refusal to grant a transfer on considerations not set forth in the statute.[7]

For the purpose of deciding the issue now before this Court the significant facts are that Judge Kirkpatrick clearly considered the various interests enumerated in § 1404(a), he exercised the discretion conferred upon him by § 1404(a), and the Third Circuit refused to grant mandamus. Without an opinion from the Third Circuit it is idle for petitioners to assert, with such assurance, their concept of why mandamus was denied.

A. *The Third Circuit's Decision in the Instant Cases Is Consistent With This Court's Decisions Concerning the Extraordinary Nature of Mandamus.*

Petitioners' assertion that the refusal of mandamus, here, conflicts with decisions of this Court approving man-

7. A similar situation existed in *Carr v. Donohoe*, 201 F. 2d 426 (8th Cir. 1953). Plaintiff resisted the district court's order granting transfer, on the ground that defendant was not subject to service in the transferee forum. However, since defendant had requested the transfer, and thus consented to service in the other forum, the transfer was proper. Although the court said it did not believe that mandamus was an appropriate method of seeking review of the transfer order and, accordingly, denied the petition, the decision is completely consistent with the test set forth in the cases in the other circuits discussed herein.

damus to review transfer orders is in error in two respects. First, they assume that the Court of Appeals denied mandamus as an inappropriate remedy to correct what petitioners claim was an improper transfer order: an unwarranted assumption in the absence of any opinion; and, second, this Court has not held that mandamus will lie to review a transfer order.

This Court has consistently held that mandamus should be granted most infrequently.[8] In *Ex Parte Fahey*, 332 U. S. 258 (1947), the Court said, pp. 259-260:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . As extraordinary remedies, they are reserved for really extraordinary causes."

The traditional use of mandamus in the federal courts has been to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *United States Alkali Export Ass'n., Inc. v. United States*, 325 U. S. 196, 202 (1945).

Applying to § 1404(a) this Court's delimitation of the use of mandamus, it is clear that an appellate court should refuse to review by mandamus the exercise of discretion by a district judge who has considered the interests stipulated in the statute and decided thereon. Only by failing to consider the stipulated interests or by considering other interests would a district judge transgress the confines of the jurisdiction established by § 1404(a). No such transgression was committed by Chief Judge Kirkpatrick in this case.

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8. Petitioners cite *Ex Parte Collett*, 337 U. S. 55 (1949); *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75 (1949); and *U. S. v. National City Lines, Inc.*, 337 U. S. 78 (1949) for the proposition that this Court will review § 1404(a) orders by mandamus. In *Ex Parte Collett, supra*, p. 72 this Court expressly stated that it did not decide whether mandamus was an appropriate remedy. Mandamus was not granted in either the *Collett* or *Kilpatrick* cases, nor was certiorari granted in the *National City Lines* case.

The extraordinary writ of mandamus is not to be used to substitute the appellate court's discretion for that of the district judge. Petitioners recognize that an order granting or denying transfer is not appealable. Should mandamus issue when the appellate court merely disagrees with the exercise of discretion by the district judge who has considered the interests set forth in the statute, the effect would be to make appealable an interlocutory order not otherwise appealable. This Court has declared that mandamus cannot be so used to substitute for an appeal. *Roche v. Evaporated Milk Ass'n.*, 319 U. S. 21 (1943).[9]

The issue now before this Court is similar to the one presented in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379 (1953). There, the district judge granted a transfer pursuant to 28 U. S. C. § 1406(a), and the Court of Appeals denied a petition for mandamus to vacate the transfer order. Mandamus was sought from this Court on the ground that appeal after final judgment was an ineffective and inadequate remedy. The Court, in refusing to grant mandamus, once again pointed out that mandamus is an extraordinary remedy and said, pp. 382-383:

> "If we applied the reasoning advanced by the petitioners, then every interlocutory order which is wrong might be reviewed under the All Writs Act [28 U. S. C. § 1651(a)]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."

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9. Certiorari will generally not be granted to review a non-appealable order. As this Court stated in *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U. S. 372, 384 (1893), ". . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." For such an extraordinary situation, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

B. *There Is No Conflict Among Circuits Concerning Availability of Mandamus With Reference to Transfer Orders.*

Any seeming conflict among circuits on the question of whether mandamus will issue to correct an order of the district court in granting or denying a motion to transfer is in the language and not the test employed. Notwithstanding differences in semantics, all circuits agree that a petition for mandamus will be denied when the district judge's exercise of discretion has been founded upon due consideration of the interests set forth in § 1404(a). A close examination of the cases cited by petitioners (Petitioners' Brief, p. 23) permits no other conclusion.

In *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2nd Cir. 1950), *cert. denied*, 340 U. S. 851 (1950), the court refused to vacate by mandamus an order denying transfer entered by the district judge after consideration of the interests stipulated in § 1404(a). The court pointed out that the district judge's action must be accepted unless it is "too wild" (Judge Frank) or "clearly erroneous" (Judge L. Hand). What is meant by "too wild" or "clearly erroneous" is apparent from *Foster-Milburn Co. v. Knight*, 181 F. 2d 949 (2nd Cir. 1950), the only case that has been found in the Second Circuit in which mandamus was granted. There, the transfer ordered was not to a "district or division where it might have been brought" (the defendant was not amenable to service in the transferee forum), and mandamus was granted because the district judge had exceeded the jurisdiction conferred upon him by the statute. Cf. *Paramount Pictures, Inc. v. Rodney*, 186 F. 2d 111 (3rd Cir. 1951), *cert. denied*, 340 U. S. 953 (1951).

In *Atlantic Coast Line R. Co. v. Davis*, 185 F. 2d 766 (5th Cir. 1950), plaintiff's action under the Federal Employers' Liability Act had been transferred pursuant to § 1404(a) from the Southern District of New York to the Southern District of Florida. Subsequently, two mistrials occurred in Florida and a third was probable. For this

reason the district judge granted plaintiff's motion for retransfer to New York. Since the district court did *not* consider the interests stipulated in § 1404(a) but founded its action on a wholly irrelevant factor, the Court of Appeals, by mandamus, vacated the transfer order.[10]

In the Seventh Circuit mandamus will not issue to vacate a transfer order when the district judge had before him all relevant evidence bearing upon the decisive factors of the convenience of parties and witnesses and decided the matter upon consideration of them. *B. Heller & Co. v. Perry*, 201 F. 2d 525, 527 (7th Cir. 1953). There, the Seventh Circuit, citing the Third Circuit decision of *Paramount Pictures, Inc. v. Rodney, supra*, for the proposition that mandamus is available to review the district judge's action, held that when the lower court considers the interests stipulated in the statute, its determination cannot be "too wild" or "clearly erroneous" in the sense these terms were used by Judges Frank and L. Hand in *Ford Motor Co. v. Ryan, supra*. However, when the district judge bases his transfer order on interests not enumerated in § 1404(a) mandamus will be granted. See *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378 (7th Cir. 1954), where the removal of the cause from the state to the federal court was thought by the district judge to preclude the party who obtained the removal from thereafter seeking a transfer.

In *Shapiro v. Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (9th Cir. 1950), the court refused to grant mandamus where the district judge denied transfer on the ground that defendant was not amenable to service in the proposed transferee forum. However, had the transfer been granted (situation obtaining in *Foster-Milburn Co. v. Knight, supra*) or had the defendant been subject to service in the transferee forum (situation obtaining in *Paramount Pic-*

10. In *In Re Illinois Cent. R. Co.*, 192 F. 2d 465, 466 (5th Cir. 1951), the Fifth Circuit pointed out that in *Atlantic Coast Line R. Co. v. Davis, supra*, it ". . . left no doubt that only in the clearest case of excess or renunciation of jurisdiction should this court issue a writ of mandamus or its correlative prohibition."

tures, Inc. v. Rodney, supra), all circuits would have granted mandamus because the district judge would have failed to confine himself to the jurisdiction prescribed in the statute.

In *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954), which followed the Third Circuit decision in *Paramount Pictures, Inc. v. Rodney, supra*, and the Fifth Circuit decision in *Atlantic Coast Line v. Davis, supra*, the court held that mandamus will issue "where the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute" (p. 874). The trial judge had considered none of the interests set out in the statute (but simply treated plaintiff's suit as a motion for new trial and transferred to the forum where the prior litigation between the parties had taken place) and, consequently, mandamus was granted.

In only five of the cases considered have petitions for mandamus been granted (*Foster-Milburn Co. v. Knight*, 2nd Cir.; *Paramount Pictures, Inc. v. Rodney*, 3rd Cir.; *Atlantic Coast Line R. Co. v. Davis*, 5th Cir.; *Chicago, R. I. & P. R. Co. v. Igoe*, 7th Cir.; and *Wiren v. Laws*, D. C. Cir.). In each the district judge failed to consider the interests stipulated by the statute or misconstrued the language of the statute with respect to other available fora. The same result would have been reached in each case in each circuit.

In concluding their argument petitioners contend (Petitioners' Brief, p. 27):

> "Nothing remains of this substantial right [to select the forum] if a District Court Judge may with impunity transfer a case and if the plaintiff has no right to a mandamus action to correct such action. The action of the District Court Judge can be arbitrary and capricious. He can refuse to consider the factors outlined in Title 28, U. S. C. 1404(a) and the plaintiff is left without any effective remedy."

There is nothing in the pronouncements of this Court, in any decision of the Third Circuit, and, particularly, in the opinion of the district judge in the instant cases upon which this contention may be founded. All circuit courts which have considered the problem conclude that mandamus will issue against a district judge who has refused to consider the factors outlined in the statute. The decisions of this Court indicate that arbitrary or capricious action on the part of the district judge would be without his prescribed jurisdiction and reviewable by mandamus.

Chief Judge Kirkpatrick in the instant cases had before him numerous affidavits dealing with all of the various factors to be weighed in disposing of the transfer motions, and he exercised his discretion thereon. His action in directing the transfers was neither arbitrary nor capricious. The Court of Appeals for the Third Circuit refused to reverse his exercise of discretion. The language of the Seventh Circuit in *B. Heller & Co. v. Perry*, 201 F. 2d 525, 527 (7th Cir. 1953), in which the court refused to reverse, by mandamus, the grant of transfer, is particularly apposite here:

> "It is apparent from what we have related that the District Judge had before him all relevant evidence bearing upon the decisive questions of the convenience of the parties and the witnesses . . . To issue these writs, in this situation, it seems to us, would be to usurp the discretionary function of the District Court."

CONCLUSION.

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

H. Francis De Lone,
William H. Lowery,
Barnes, Dechert, Price, Myers & Rhoads,
Attorneys for Respondent.

Appendix.

AFFIDAVITS FILED IN SUPPORT OF THE MOTIONS FOR TRANSFER.

Affidavit of M. V. Barnhill, Jr., in Alexander Norwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. BARNHILL, JR., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. This is an action based on injuries to plaintiff, allegedly sustained while upon one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

2. Fifteen witnesses whose presence and testimony are essential to the defense of this case reside in or near Florence, South Carolina. Eight of these witnesses are physicians who attended plaintiff for the injuries allegedly sustained in the accident upon which this action is based.

3. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

4. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville,

North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

5. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

6. Plaintiff was a patient for several weeks in St. Eugene Hospital, Dillon, South Carolina, where he was taken after the accident. The records of St. Eugene Hospital, with a proper custodian to identify them, are essential to the defense of this case.

7. None of the witnesses referred to above reside in or near Philadelphia, Pennsylvania.

8. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania, and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

9. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South Carolina without serious interference with or interruption of their regular duties.

10. The cost to defendant of transporting and maintaining the witnesses essential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

11. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

12. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

[s] M. V. BARNHILL, JR.

Sworn to and subscribed before me this 8 day of January, 1954.

[s] B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of C. F. Taliaferro in Alexander Norwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. TALIAFERRO, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr., relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr., would be $3,566.84 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.
2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.
3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Fifteen witnesses set forth in Paragraph 2:

Transportation	$925.80
Food	525.00
Lodging	450.00
Total	$1,900.80

Nine witnesses set forth in Paragraph 3:		
Transportation	$400.05	
Food	315.00	
Lodging	270.00	
Total		985.05
Three witnesses set forth in Paragraph 4:		
Transportation	$159.99	
Food	105.00	
Lodging	90.00	
Total		354.99
Two witnesses set forth in Paragraph 5:		
Transportation	$ 69.28	
Food	70.00	
Lodging	60.00	
Total		199.28
One witness set forth in Paragraph 6:		
Transportation	$ 61.72	
Food	35.00	
Lodging	30.00	
Total		126.72
Grand Total		$3,566.84

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

[s] C. F. TALIAFERRO

Sworn to and subscribed before me this 7 day of January, 1954.

[s] B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of M. V. Barnhill, Jr., in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. Barnhill, Jr., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. Plaintiff, Joseph F. Tunstall, resides in the District of Columbia.

2. This action is based on injuries to the plaintiff allegedly sustained while employed as a dining car waiter on one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

3. Seven witnesses whose presence and testimony are essential to the defense of this case reside in or near Florence, South Carolina.

4. Two witnesses, physicians who attended the plaintiff for the injuries allegedly sustained in the accident upon which this action is based and whose presence and testimony are therefore essential to the defense of this case, reside in Marion, South Carolina.

5. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

6. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville, North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

7. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

8. Two additional physicians whose presence and testimony are essential to the defense of this case reside in Charleston, South Carolina and in Washington, District of Columbia, which are approximately 550 miles and 135 miles respectively from Philadelphia, Pennsylvania.

9. The plaintiff was a patient at Marion County Memorial Hospital, Marion, South Carolina, where he was taken after the accident until June 1, 1953. The records of the Marion County Memorial Hospital, with a proper custodian to identify them, are essential to the defense of this case.

10. None of the witnesses referred to above and no witnesses of which your affiant has any knowledge reside in or near Philadelphia, Pennsylvania.

11. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

12. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South

Carolina without serious interference with or interruption of their regular duties.

13. The cost to defendant of transporting and maintaining the witnesses esential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

13. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

14. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

/s/ M. V. Barnhill, Jr.

Sworn to and subscribed before me this 11th day of January, 1954.

/s/ B. B. Reynolds,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of C. F. Taliaferro in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. Taliaferro, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr. relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr. would be $2,849.53 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.

2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Seven witnesses set forth in Paragraph 3:

Transportation	$379.33
Food	245.00
Lodging	210.00
Total	$834.33

Two witnesses set forth in Paragraph 4:

Transportation	$106.88
Food	70.00
Lodging	60.00
Total	$236.88

Nine witnesses set forth in Paragraph 5:

Transportation	$348.30
Food	315.00
Lodging	270.00
Total	$933.30

Three witnesses set forth in Paragraph 6:

Transportation	$139.98
Food	105.00
Lodging	90.00
Total	$334.98

Two witnesses set forth in Paragraph 7:

Transportation	$ 57.78
Food	70.00
Lodging	60.00
Total	$187.78

Two witnesses set forth in Paragraph 8:

Transportation	$ 78.82	
Food	65.00	
Lodging	60.00	
Total		$203.82

One witness set forth in Paragraph 9:

Transportation	$ 53.44	
Food	35.00	
Lodging	30.00	
Total		$118.44
Grand Total		$2,849.53

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

/s/ C. F. TALIAFERRO

Sworn to and subscribed before me this 11th day of January, 1954.

/s/ B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of M. V. Barnhill, Jr., in John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. Barnhill, Jr., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. Plaintiff, John E. Smallwood, resides in the District of Columbia.

2. This action is based on injuries to the plaintiff allegedly sustained while employed as a dining car cook on one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

3. Ten witnesses whose presence and testimony are essential to the defense of this case, including three physicians who attended the plaintiff for the injuries allegedly sustained in the accident upon which this action is based, reside in or near Florence, South Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

4. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

5. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville, North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

6. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

7. Three additional physicians whose presence and testimony are essential to the defense of this case reside in Washington, District of Columbia, which is approximately 135 miles from Philadelpia, Pennsylvania.

8. The plaintiff was a patient at McLeod Infirmary, Florence, South Carolina, where he was taken after the accident until April 25, 1953. The records of the McLeod Infirmary, with a proper custodian to identify them, are essential to the defense of this case.

9. None of the witnesses referred to above and no witnesses of which your affiant has any knowledge reside in or near Philadelphia, Pennsylvania.

10. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

11. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South Carolina without serious interference with or interruption of their regular duties.

12. The cost to defendant of transporting and maintaining the witnesses essential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

13. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

14. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

/s/ M. V. Barnhill, Jr.

Sworn to and subscribed before me this 3rd day of February, 1954.

/s/ R. N. Getty,
(Seal) *Notary Public.*
My Commission Expires: January 12, 1956.

Affidavit of C. F. Taliaferro in John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. Taliaferro, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr. relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr. would be $2,993.11 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.

2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Ten witnesses as set forth in Paragraph 3:		
Transportation	$541.90	
Food	350.00	
Lodging	300.00	
Total		$1,191.90
Nine witnesses as set forth in Paragraph 4:		
Transportation	$343.30	
Food	315.00	
Lodging	270 90	
Total		$ 933.30
Three witnesses as set forth in Paragraph 5:		
Transportation	$139.98	
Food	105.00	
Lodging	90.00	
Total		$ 334.98
Two witnesses as set forth in Paragraph 6:		
Transportation	$ 57.78	
Food	70.00	
Lodging	60.00	
Total		$ 187.78
Three witnesses as set forth in Paragraph 7:		
Transportation	$ 45.96	
Food	90.00	
Lodging	90.00	
Total		$ 225.96
One witness as set forth in Paragraph 8:		
Transportation	$ 54.19	
Food	35.00	
Lodging	30.00	
Total		$ 119.19
Grand Total		$2,993.11

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

/s/ C. F. TALIAFERRO

Sworn to and subscribed before me this 2nd day of February, 1954.

/s/ R. N. GETTY,
Notary Public.
My Commission Expires: Jan. 12, 1956.

Affidavit of M. V. Barnhill, Jr., in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. BARNHILL, JR., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above cases; that he is familiar with the facts developed in the investigation of the accident out of which these causes of action arose and with the representation of the respective plaintiffs; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information, and belief:

1. The presence and testimony of the following twenty-four fact witnesses are essential to the defense of these three cases, and defendant expects to call all of them at the trial of each of these three cases:

Members of Crew of the Derailed Train:

T. M. Maxwell, Conductor, 708 Pender St., Rocky Mount, N. C.

B. B. Sweeney, Engineman, 618 Buena Vista, Rocky Mount, N. C.

W. L. Bond, Baggagemaster, 1530 S. Church St., Rocky Mount, N. C.

W. B. Rudisill, Flagman, 2524 W. Grace St., Richmond, Va.

E. James, Porter, 1008 N. 8th Street, Richmond, Va.

Members of Crew of Extra Train 307 North, the train standing in the siding at the time and place of the derailment, who will testify concerning the functioning of the switches and signals a few minutes before the derailment occurred:

W. W. Carson, Conductor, 1530 S. Church St., Rocky Mount, N. C.

W. D. Fountain, Engineman, 808 Wester Avenue, Rocky Mount, N. C.

W. N. Smith, Flagman, 621 Norfolk St., Rocky Mount, N. C.

James Ray, Brakeman, 225 Hendrix St., Rocky Mount, N. C.

Conductors of trains which passed the point of derailment shortly before the accident, who will testify concerning the operation of the signal equipment and switches only a short time before the accident:

T. R. Bennett, Richmond, Va.

C. T. Collins, Richmond, Va.

Witnesses who inspected the derailed cars and locomotives and who will testify concerning their findings:

J. C. Bryant, Foreman, Pamplico Road, Florence, S. C.

J. C. Wallace, Car Inspector, 827 W. Rowan St., Fayetteville, N. C.

Levermen-Telegraphers at Control Tower, Maple, S. C., who will testify concerning the operation of the switches and signal equipment and other automatic facilities involved in the derailment:

O. P. Raiford, 105 S. 12th St., Dillon, S. C.

E. S. Bethea, Dillon, S. C.

Witnesses who will testify with respect to the construction and maintenance of the signal equipment involved in the derailment:

S. J. Davis, Signal Engineer, Wilmington, N. C.

W. P. Robinson, Signal Inspector, Florence, S. C.

N. D. Ford, Signal Maintainer, Dillon, S. C.

J. R. McLeod, Section Master, Dillon, S. C., who will testify concerning trackage maintenance in the area where the derailment occurred.

J. S. Webb, Chief Engineer, Communication and Signaling, Wilmington, N. C., who will testify concerning the signal system used on defendant's lines.

R. L. Groover, Chief Engineer, Wilmington, N. C., who will testify concerning the construction, maintenance and condition of defendant's track.

H. G. Moore, Asst. General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify concerning the condition of defendant's cars and coaches.

F. D. Sineath, Asst. General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify concerning the condition of defendant's locomotives.

G. G. Lynch, Asst. to General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify as to the speed tape and the interpretation thereof.

2. The presence and testimony of the following medical witnesses are essential to the defense of these cases, and defendant expects to call all of those listed at the trial of each respective case:

Norwood v. Atlantic Coast Line

Dr. James A. McLeod, 140 S. Irby St., Florence, S. C.

Dr. W. Thad Bethea, Jr., Latta, S. C.

Dr. J. P. Cain, St. Eugene Hospital, Dillon, S. C.

Dr. O. R. Russell, St. Eugene Hospital, Dillon, S. C.

Dr. Wayne Reeser, St. Eugene Hospital, Dillon, S. C.

Dr. L. D. Lide, Jr., St. Eugene Hospital, Dillon, S. C.

Dr. J. O. Wanner, St. Eugene Hospital, Dillon, S. C.

Dr. Swift C. Black, St. Eugene Hospital, Dillon, S. C.

Custodian of Records, St. Eugene Hospital, Dillon, S. C.

Tunstall v. Atlantic Coast Line

Dr. E. M. Dibble, Marion, S. C.

Dr. Luther C. Martin, 82 Rutledge Ave., Charleston, S. C.

Dr. William L. Cheezem, Jr., Academy St., Marion, S. C.

Dr. J. A. Talbot, 1835 Eye St., N. W., Washington 6, D. C.

Dr. E. M. McPeak, 915 19th St., N. W., Washington 6, D. C.

Custodian of Records, Marion County Memorial Hospital, Marion, S. C.

Smallwood v. Atlantic Coast Line

Dr. George R. Dawson, 129 W. Cheves St., Florence, S. C.

Dr. C. H. Kingsbury, Florence, S. C.

Dr. J. M. Lide, Florence, S. C.

Dr. J. A. Talbot, 1835 Eye St., N. W., Washington 6, D. C.

Dr. E. M. McPeak, 915 19th St., N. W., Washington 6, D. C.

Dr. H. L. Phillips, Washington, D. C.

Custodian of Records, McLeod Infirmary, 107-147 W. Cheves St., Florence, S. C.

3. Plaintiff Norwood has been represented by the following attorneys with regard to the subject matter of his instant suit:

Gair & Gair, 84 Williams St., New York 38, N. Y. (Notice of representation was received from them in May, 1953; these attorneys ceased to represent Norwood in June, 1953).

Weinberg & Lewin, 570 Seventh Ave., New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle St., Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received from them in August, 1953).

Irving Stenn started suit on behalf of Norwood against the Atlantic Coast Line on August 3, 1953 in the Circuit Court of Cook County, Illinois as of No. 53 C. 11891. A Special Appearance and a Motion to Quash the Summons on ground of lack of jurisdiction in personam was filed on defendant's behalf. The suit was dismissed on December 4, 1953, on motion of the plaintiff. Richter, Lord and Farage started the instant suit (Norwood) on September 21, 1953.

4. Plaintiff Tunstall has been represented by the following attorneys with regard to the subject matter of his instant suit:

Weinberg & Lewin, 570 Seventh Ave., New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle St., Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received from them in November, 1953).

Irving N. Stenn started suit on behalf of Tunstall against the Atlantic Coast Line on July 31, 1953, in the Circuit Court of Cook County, Illinois, as of No. 53 C. 11860. A Special Appearance and a Motion to Quash the Summons on ground of lack of jurisdiction in personam was filed on defendant's behalf. The suit was dismissed on December 4, 1953, on motion of the plaintiff. Richter, Lord and Farage started the instant suit (Tunstall) on December 17, 1953.

5. Plaintiff Smallwood has been represented by the following attorneys with regard to the subject matter of his instant suit:

Weinberg & Lewin, 570 Seventh Avenue, New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle Street, Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received in January, 1954).

Richter, Lord and Farage started the instant suit (Smallwood) on January 19, 1954.

/s/ M. V. Barnhill, Jr.
M. V. Barnhill, Jr.

Sworn to and subscribed before me this 19th day of April, 1954.

/s/ R. N. Getty,
(Seal) *Notary Public.*
My commission expires January 12, 1956.

AFFIDAVITS FILED IN OPPOSITION TO THE MOTIONS FOR TRANSFER.

Affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, Alexander Norwood, lives in Chester, Pennsylvania. He has been treated by Dr. John T. Farrell, a resident of the City of Philadelphia; Dr. James Lehman, a resident of the City of Philadelphia; Dr. Albert E. Bothe, a resident of the City of Philadelphia; Dr. F. Lafenus Hutchins, a resident of Chester, Pennsylvania; Dr. K. J. Crothers, a resident of Chester, Pennsylvania. All of these doctors have offices in the cities of their residences. All of the above listed doctors will testify on the condition of this plaintiff and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that the plaintiff was confined to the Fitzgerald Mercy Hospital, Darby, Pennsylvania, and the Chester Hospital, Chester, Pennsylvania. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred that there can be little question of liability, and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted, many of these passengers would be necessary as witnesses for the plaintiff as

to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability witnesses, would be prohibitive. It is further averred that Chester, Pennsylvania is 20 miles from Philadelphia, Pennsylvania, and Florence, South Carolina is 527 miles from Chester, Pennsylvania. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice, this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

"EXHIBIT A"

Frank Blindt	Maplewood, New Jersey
Drucella Blindt	Maplewood, New Jersey
Mrs. A. H. Anderson	Long Island, New York
Samuel Cohn	Brooklyn, New York
Melvin Yadley	Newark, New Jersey
Archie Korngut	Newark, New Jersey
John Grimes Far	Rockaway, New York
Helen Grimes Far	Rockaway, New York
Charles Brannon	Brooklyn, New York
J. E. Wideman	New York City, New York
Fannie Forman	Bronx, New York
Sam Forman	Bronx, New York
Fannie Blumenthal	Bronx, New York
Joseph Grubman	Bronx, New York
Rebecca Heimowitz	Bronx, New York
Lillian Homer	Staten Island, New York
Dora Lehrman	Forest Hills, New York
Mrs. Tanba Lendar	Brooklyn, New York
Sophia Mercer	Manhasset, Long Island, New York
Abe Reis	Brooklyn, New York
Freida Reis	Brooklyn, New York
Nettie Shuman	Brooklyn, New York
Iris Rita Shuman	Brooklyn, New York
Nettie Shuman	Brooklyn, New York
Iris Rita Shuman	Brooklyn, New York
Anne Toback	Brooklyn, New York
Leo Winick	Brooklyn, New York
Nettie Winick	Brooklyn, New York
Mary R. Yeager	Plainfield, New Jersey
Abraham Bursick	Brooklyn, New York
Rae Zagon	New York City, New York
Belle Lipman	Brooklyn, New York
Joseph Movis	Brooklyn, New York

Sadie Movis	Brooklyn, New York
William Conner	Lakewood, New Jersey
Suzanne Bichsel	Queens Village, New York
Matilda Scalese	Jackson Heights, New York
Rose Kilner	Brooklyn, New York
Laura Sapp	Philadelphia, Pennsylvania
Antoinette Marino	Long Island, New York
Eldora Slaughter	Brooklyn, New York
Eloise Sullivan	Nyack, New York
Alma K. Doe	Mt. Vernon, New York

Affidavit of Charles A. Lord in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, John Tunstall, is a resident of the District of Columbia and has been treated by Dr. Donald Jones, a resident of the City of Philadelphia; Dr. John T. Farrell, a resident of the City of Philadelphia, both of whom practice and have offices in the City of Philadelphia; by Dr. Williams and Dr. Robinson, both of whom live and practice in the District of Columbia; and was confined in the Freedmen Hospital in Washington, D. C. for treatment. All of the above listed doctors will testify on the condition of this plaintiff, and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred there can be little question of liability and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted many of these passengers would be necessary as witnesses for the plaintiff as to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability witnesses, would be prohibitive. It is further averred that it is 135 miles between Philadelphia and Washington,

D. C., while it is 412 miles between Washington, D. C. and Florence, South Carolina. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

["Exhibit A" contains list of same names and addresses as are attached to the affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.]

Affidavit of Charles A. Lord in John E. Smallwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, John E. Smallwood, is a resident of the District of Columbia and has been treated by Dr. Hugh Gray, a resident of the District of Columbia; Dr. Robinson, a resident of the District of Columbia; Dr. Philip Johnson, a resident of the District of Columbia; Dr. Vasilios S. Lambros, a resident of the District of Columbia; Dr. Wilkinson, a resident of the District of Columbia; and was confined at the Emergency Hospital in the District of Columbia. It is further averred that all of the above doctors have offices in the District of Columbia. All of the above listed doctors will testify on the condition of this plaintiff, and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred that there can be little question of liability and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted many of these passengers would be necessary as witnesses for the plaintiff as to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability

witnesses, would be prohibitive. It is further averred that it is 135 miles between Philadelphia and Washington, D. C., while it is 412 miles between Washington, D. C. and Florence, South Carolina. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice, this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

["Exhibit A" contains list of same names and addresses as are attached to the affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.]

Affidavit of James P. Mozingo, III, in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF SOUTH CAROLINA,
COUNTY OF DARLINGTON,

Personally appeared before me James P. Mozingo, III., who, being duly sworn says that he is a practicing attorney at law, with his office located in Darlington, S. C.; that he has been duly admitted to practice in the District Court of the United States for the Eastern District of South Carolina; that his practice is principally personal injury or tort law on behalf of the injured person; that as such he is very vitally concerned with the size of verdicts in the courts of the State of South Carolina and including the Federal Courts in South Carolina; that although his practice in the District Court of the United States for the Eastern District of South Carolina is had principally in the Columbia and Florence Divisions, he has handled cases in the other divisions of the said Eastern District; that he resides in Darlington, S. C., which is located ten (10) miles from Florence, S. C. where the trials in the Florence Division of the Eastern District of South Carolina are held; that the largest verdict that he recalls as ever being rendered since 1949 by a jury in a personal injury case in the Florence Division was in the amount of Twenty Thousand ($20,000.00) Dollars, rendered in 1953, and prior to 1949 was one rendered prior to World War II in the amount of Fifteen Thousand ($15,000.00) Dollars for very severe personal injuries; that according to his information and belief, there have been tort claim cases wherein judgment at a greater amount has been rendered; that from his experience in the actual trial of law suits in the Eastern District of South Carolina, he finds that verdicts for personal injuries suffered by a Negro are not as high as verdicts for a White person, all other things being equal; that the Florence Divi-

sion of the United States District Court for the Eastern District of South Carolina is known to him as a very low verdict court and for that reason he tries his Federal Court cases in one of the other Divisions whenever possible.

/s/ James P. Mozingo, III
James P. Mozingo, III

Sworn to before me this 3 day of May, 1954.

/s/ Nancy Alice Bowie (L.S.)
Notary Public for South Carolina.

Affidavit of John L. Nettles in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF SOUTH CAROLINA }
COUNTY OF DARLINGTON }

PERSONALLY appeared before me JOHN L. NETTLES, who, being first duly sworn, says that he is an attorney-at-law, duly admitted to practice before the Supreme Court of the State of South Carolina, and in the District Court of the United States for the Eastern District of South Carolina; that he practices in Darlington, South Carolina, which is located ten miles from Florence, South Carolina; that his practice is such that he is actively engaged in litigation in the District Court for the Eastern District of South Carolina, principally in the Columbia and Florence Divisions; that Darlington is located within the Florence Division.

That deponent has made an investigation concerning the size of jury verdicts in personal injury cases rendered in the Florence Division; that from his own knowledge he knows of no verdict rendered in said Division of sufficient size to be worthy of mention.

That deponent contacted several of the outstanding law firms handling matters in the Florence Division and according to the information received, which deponent believes to be true, the largest verdict rendered in the Florence Division in a personal injury action was in the amount of Twenty Thousand ($20,000.00) Dollars.

That Deponent at said time of making inquiries concerning the largest verdict also attempted to determine the largest verdict for a white person and the largest verdict for a colored person, and while deponent was unable to determine the exact figures in this connection, he discovered that verdicts generally are higher for white persons than for colored persons, all other things being equal.

That the Florence Division is noted throughout the Eastern District of South Carolina as an extremely low verdict center, notwithstanding the fact that jurors for the Florence Division are drawn from the same territorial limits as are jurors for the other Divisions comprising the Eastern District of South Carolina.

/s/ JOHN L. NETTLES
John L. Nettles

Sworn to before me this 3 day of May, 1954.

/s/ NANCY ALICE BOWIE (Seal)
Notary Public for South Carolina.

Affidavit of Franklin F. Balthaser in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

FRANKLIN F. BALTHASER, being duly sworn according to law, deposes and says that he is a resident and citizen of Philadelphia, Pennsylvania, and that he has been engaged in railroading all of his adult life for a period in excess of 37 years; that in the course of his work he has been a fireman, brakeman, conductor, assistant yard master, yard master, general yard master, and assistant train master for the Reading Company, and that in the course of those years he has hired, trained, supervised, and examined literally thousands of employees; that he is fully familiar with all of the aspects of railroading in both yard and road service; that he is familiar with tower operations, switching operations, and the maintenance of tracks and right of ways; that he is familiar with causes of derailments, the usual and customary procedure of inspection of equipment and roadway involved in derailments.

Your deponent further avers that he has read the affidavit of M. V. Barnhill, Jr., who is general solicitor of the Atlantic Coast Line Railroad Company, filed in the above entitled cases setting forth the reasons for producing twenty-four fact witnesses whose names are set forth inter alia in said affidavit. These witnesses are hereinafter discussed in order to determine whether such persons are necessary witnesses to prove the cause of the said derailment.

1. Your deponent further avers that he has also read the report of the I. C. C. which states:

> "We find that this accident was caused by the movement of train No. 2 at high speed over an interlocked

switch, the points of which were unlocked and not in proper position, the reason for which cannot be definitely determined at this time."

2. The accident occurred because the switch at which the derailment occurred was not locked as is required when trains are moving at a high speed over the tracks. Admittedly the investigations conducted by the I. C. C. and by the defendant itself will establish that this was a through train moving at a high speed.

3. The testimony of the members of the crew of the derailed train can do nothing more than establish that fact and prove nothing as to the switch.

4. The testimony of the members of the crew of extra train 307 North is clearly irrelevant as theirs was merely a movement at slow speed over the switch. Their testimony can be of no significance as they had nothing to do with lining up the switch, and the fact that they did not derail when passing over the switch is not important because the testimony given before the official board indicates that they moved at a very slow speed which could not cause a derailment.

5. The testimony of conductors of other prior trains is completely irrelevant as the switch had been lined up for their movements long before the movement in question took place and other intervening movements had taken place prior to the movement when the accident actually occurred. The switch naturally had been unlocked after later movements had been made.

6. Witnesses who inspected the derailed cars and locomotives are obviously unimportant as how badly the cars were damaged or what point they were damaged as a result of the derailment would not prove whether or not the switch was unlocked or why. This can establish nothing as to the cause of the accident nor as to the nature of the injuries. The injuries speak for themselves and can only be corro-

borated by the doctors' testimony. The cause of the accident was due to the fact that the switch was not locked. Nothing on the cars or loco.notive can prove or disprove that fact. This is merely a matter of record which was noted as the movements were made in either direction and they would be merely interpreting records that speak for themselves and can be produced here in Philadelphia. Whether the switch was locked or not is something with which they have nothing to do.

7. Witnesses who will testify with respect to construction and maintenance of the signal equipment are likewise of no importance inasmuch as their testimony only goes to the method of construction and maintenance of signal equipment involved in derailments. Inasmuch as the accident happened not because of any defect in signals but rather because someone failed to lock the switch, it is of no significance.

8. J. R. McLeod is the Section Master and his testimony concerning trackage maintenance will not be important as it only goes to the question of maintenance of the switch.

9. J. S. Webb's testimony is obviously unimportant since the accident was due to the failure to lock the switch and testimony on signal system is irrelevant and not probative of the sole issue on liability.

10. The same is true of the testimony of R. L. Goover, H. G. Moore and F. D. Sineath, who are all men who will testify concerning locomotives, cars and coaches and the construction and maintenance and condition of the tracks.

11. The testimony of G. G. Lynch explaining the speed tape in an effort to establish perhaps that the train did not run as fast as was indicated in the I. C. C. report would probably not be very probative in view of the fact that the I. C. C. has already found that the train was going 90 miles an hour at the time of the accident.

12. Your deponent further avers that this accident could only have resulted because an important switch was unlocked. Said switch was on a main line over which heavy traffic of large trains of cars travel at speeds of 90 miles an hour. Said switch is required to be carefully locked so as to prevent its coming open by reason of the speeds at which traffic moved over it. Whether it was locked, or if locked, why it became unlocked, can be testified to only by the one witness whose duty it was to lock it and keep it locked.

Your deponent further avers that in the course of an investigation into an accident such as this, I, in my duty as assistant train master would never call the above enumerated witnesses as they could not possibly add any information of any value to inform me of the cause of such a derailment, which admittedly was "an unlocked switch".

(s) FRANKLIN F. BALTHASER,
Franklin F. Balthaser

Sworn to and subscribed before me this 5th day of May, 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.